

PRIVATE INTERNATIONAL LAW (IMPLEMENTATION OF AGREEMENTS) BILL [HL]

EXPLANATORY NOTES ON COMMONS AMENDMENTS

What these notes do

- 1 These Explanatory Notes relate to the Commons Amendments to the Private International Law (Implementation of Agreements) Bill [HL] as brought from the House of Commons on 7 October 2020 (HL Bill 139).
- 2 These Explanatory Notes have been prepared by the Ministry of Justice in order to assist the reader of the Bill to understand the Commons amendments, and to help inform debate on the Commons amendments. They do not form part of the Bill and have not been endorsed by Parliament.
- 3 These Explanatory Notes, like the Commons amendments themselves, refer to Bill 150, the Bill as first printed for the Commons.
- 4 These Explanatory Notes need to be read in conjunction with the Commons amendments and the text of the Bill. They are not, and are not meant to be, a comprehensive description of the Commons amendments.
- 5 Commons Amendments 1 (New Clause), 2, 3, 4 (New Schedule) and 5 were tabled in the name of the Minister.

Commentary on Commons amendments

Commons Amendments to reinstate the former Clause 2 (delegated power): Implementation of other agreements on private international law

Commons Amendments 1 (New Clause), 4 (New Schedule) and Amendment 2

- 6 The Clause 2 delegated power ("the power") was part of this Bill upon its introduction in the House of Lords on 27 February 2020 but was removed at Report. These amendments re-introduced the delegated power at Committee stage in the House of Commons.
- 7 Subsection (1) of Amendment 1 gives an "appropriate national authority" the power to make regulations (secondary legislation) to implement international agreements on Private International Law (PIL). The power can also be used to amend existing domestic provisions implementing a PIL agreement if any changes to its implementation are required.
- 8 Subsection (2) of Amendment 1 provides that regulations may also be made to implement an international agreement on PIL for application between England and Wales, Scotland and

Northern Ireland, so the same rules can be applied in cases raising cross-border issues between the three different legal jurisdictions in the UK, even if that is not a requirement of the international agreement itself.

- 9 Subsection (3) of Amendment 1 provides that regulations may be made to give effect in UK domestic law to any arrangements for applying a relevant international agreement on PIL (with or without modifications), entered into by the Government and the Crown Dependencies and Overseas Territories. The term “relevant territory” is defined in subsection (7).
- 10 Subsections (4) and (5) of Amendment 1 make further provisions about the sorts of provisions regulations made under subsection (1) may include. Subsection (5) makes clear that regulations may implement obligations in a PIL agreement which relate to the provision of legal aid or provisions which concern the sharing of information between courts or competent authorities dealing with cross border disputes. Subsection (5) also makes clear that regulations may include enforcement provisions, but these will be subject to the restrictions in paragraph 1 of Schedule 6.
- 11 International agreements on PIL rarely contain provisions about criminal offences, but it may be necessary when implementing some agreements, for example in the field of family law, to create enforcement provisions involving criminal offences. This is likely to be the case where there is already an equivalent domestic enforcement provision involving criminal offences. For example, breaches of “protection measures” such as non-molestation orders in England and Wales under Part 4 of the Family Law Act 1996 or injunctions under section 3 of the Protection from Harassment Act 1997 (civil remedy), may be punishable as criminal offences. Paragraph 1 of Schedule 6 restricts national authorities from making regulations which create criminal offences imposing sentences of imprisonment of more than two years.
- 12 Subsection (6) of Amendment 1 introduces the new Schedule (Amendment 4) which sets out restrictions on the use of the power in Amendment 1 and the legislative procedure to be followed when making regulations under the new Clause in Amendment 1.
- 13 Paragraph (7) of Amendment 1 provides definitions of various terms used in that clause.
- 14 The effect of the definition of “appropriate national authority” is that the power in subsection (1) of Amendment 1 could be exercised by a Secretary of State in relation to England and Wales, the Scottish Ministers in relation to Scotland, and a Northern Ireland department in relation to Northern Ireland. The Secretary of State may also make regulations in relation to Scotland and Northern Ireland but only with the consent of the relevant devolved administrations.
- 15 The definition of “international agreement” covers a convention, treaty or agreement to which the UK has already become a contracting party or to which it intends to become a contracting party (for example, it may have signed but not ratified the agreement). This ensures that it will be possible to exercise the power in subsection (1) of Amendment 1 to make implementing regulations before an agreement is ratified. It is normal practice to ensure that domestic implementing legislation is in place before the UK formally becomes bound by an international obligation, so that it is able to comply with it immediately.
- 16 The definition of “private international law” provides examples of the sorts of issues typically covered by international agreements in this field of law. The definition means that the power could be used, for example, to implement the 2007 Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, the 2019 Singapore Convention on Enforcement of Mediated Settlement Agreements, and the 2019

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Hague Convention on Recognition and Enforcement of Judgments in Civil and Commercial Matters, should the Government decide to join these in future.

- 17 Subsection (8) of Amendment 1 provides for the implementation of model laws relating to PIL adopted by an international organisation of which the UK is a member. It provides that the regulation making power in subsection (1) may be used to “give effect to” – rather than “implement” – a model law, because the text of a model law is not binding in the way that an international agreement is, and states may adapt a model law when giving effect to it.
- 18 The provisions of Amendment 4, to create a new Schedule are as follows:
- 19 Paragraph 1(1)(a) of Amendment 4 provides that regulations made under the new Clause in Amendment 1 may not themselves confer a new power to legislate, other than a power to make procedural rules for courts or tribunals, but can modify or extend an existing power. Paragraph 1(1)(b) imposes limits on making regulations which create an offence subject to a term of imprisonment.
- 20 Paragraphs 2 to 6 deal with the procedure and Parliamentary scrutiny for making regulations under the new Clause in Amendment 1. Paragraph 2 provides that the power to make regulations is exercisable by statutory instrument, or in relation to Northern Ireland by statutory rules. For regulations made by the Scottish Ministers, see section 27 of the Interpretation and Legislative Reform (Scotland) Act 2010. Paragraph 3 deals with the procedure for regulations made by the Secretary of State. Paragraph 4 deals with the procedure for regulations made by the Scottish Ministers. Paragraph 5 deals with the procedure for statutory rules made by a Northern Ireland department. In each case, the affirmative procedure will be triggered if the regulations:
 - a. are implementing a new international agreement on PIL for the first time in domestic law, or a new arrangement entered into between different jurisdictions in the UK, or between the UK and an Overseas Territory or Crown Dependency, to apply an arrangement based on an international agreement (suitably modified) between them;
 - b. create, extend or increase the penalty for a criminal offence; or
 - c. amend primary legislation (defined by paragraph 6 to include an Act of the Scottish Parliament, an Act or Measure of Senedd Cymru or any Northern Ireland legislation).
- 21 It is anticipated that most regulations made under the power will trigger the affirmative procedure because they will be implementing new agreements which the UK has decided to join. However, it is possible that regulations may need to be made subsequently to make adjustments to technical or procedural aspects of the approach to implementation originally adopted when an agreement was first implemented, for example, an update to forms to be used. As indicated above, the power will also be used to schedule the text of the declarations and reservation which were made when the UK joined the 2005 and 2007 Hague Conventions as a contracting party in its own right ready for the end of the transition period. In the latter case it is anticipated that the affirmative procedure will anyway be triggered because primary legislation will need to be amended.
- 22 Amendment 2 reintroduces subsections (2) and (3) of what was previously Clause 3 of the Bill as introduced (and became Clause 2 when the Bill passed to the Commons), which establishes the Crown application of the Bill. It provides that regulations made under the New Clause of the Bill may make provision binding the Crown. "The Crown" is defined by subsection (3) as excluding the Queen in her private capacity or in right of the Duchy of Lancaster, and the Duke of Cornwall.

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- 23 This amendment will reinstate the same "Crown application" provisions as were in the Bill when originally introduced in the House of Lords, when it contained the delegated power. These mirror the Crown application provisions of the Civil Jurisdiction and Judgments Act 1982.

Commons Amendments to introduce a Permissive Extent Clause for the Isle of Man

Commons Amendment 3

- 24 This amendment provides that Her Majesty may by Order in Council provide for the new Clause in Amendment 1 (including the new Schedule 4 in Amendment 4) and the Crown application provisions (as amended by Amendment 2) to extend, with or without modifications, to the Isle of Man.
- 25 In developing the Bill, Government officials have engaged with all of the Crown Dependencies (CDs) and Overseas Territories (OTs) at official level about the Bill, particularly with regards to the former Clause 2 paragraph 3 (now subsection (3) of Amendment 1) which concerns the implementation in domestic law of an arrangement entered into between the UK government and the relevant CD or OT to apply the terms of an international agreement on private international law (PIL) between the UK and that CD or OT (subject to necessary modifications). The Government believes that such arrangements could be mutually beneficial and would only be set up where a self-governing dependency or territory was content to do so. The delegated power would allow the UK to implement any such arrangements in domestic law in the UK. The domestic implementation in a CD or OT of any such arrangement with the UK would remain the responsibility of the Government of that dependency or territory in question. Officials in the CDs and OTs responded positively and are clear there is support for the overall policy intent of the Bill.
- 26 Following this official-led engagement, the Isle of Man (IoM) Government has made a formal request for the inclusion of a Permissive Extent Clause (PEC) in this Bill. Ordinarily primary legislation passed by the UK Parliament does not apply to the CDs as a matter of course, but the inclusion of a PEC will allow relevant sections of this Bill to be extended to the IoM by an Order in Council. This requires a further (though very narrow) delegated power being added to the Bill at this stage, allowing the Order in Council to be made. The creation of such a power is the purpose and effect of this amendment.
- 27 This amendment will allow the IoM Government, once the subsequent Order in Council is made, to make their own regulations under the Bill's New Clause power. This would give the IoM Government the ability to implement, in their own jurisdiction, those PIL agreements which the UK has extended to them, and secondly any 'arrangements' which are agreed between the UK and the Isle of Man to apply the terms of an international agreement (subject to necessary modifications) as between them both. This negates the need for bespoke primary legislation on their part. This amendment would not allow the Government to extend the Bill to any other CD or OT, or to make regulations for any other self-governing dependency or territory using the power in the new Clause in Amendment 1. This amendment does not impact on the UK.

Commons Amendments to Title

Commons Amendment 5

- 28 Amendment 5 ensures that the long title of the Bill reflects the reinstatement of the delegated power (new Clause in Amendment 1) to implement agreements on private international law.

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The amendment to the long title of the Bill will set out its scope not only to implement the Hague Conventions of 1996, 2005 and 2007, but also “to provide for the implementation of other international agreements on private international law”. This title more accurately reflects the content of the Bill as amended by the House of Commons.

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